No. 11,119

United States Circuit Court of Appeals

For the Ninth Circuit

HOUGHTON GIFFORD,

Appellant,

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT

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JURISDICTION

As appears from the complaint (R. 2-6) the amount in controversy, without interest or costs, is $5,000.00. The action was removed from the Superior Court of the State of California in and for the City and County of San Francisco upon the ground of diversity of citizenship, and the requisite jurisdictional amount (R. 7). The jurisdiction of the District Court is sustained by Judicial Code, §24(1)(b) and Judicial Code, §28 (28 U.S.C.A. §§41(1)(b) and 71).

Final judgment in the District Court was rendered and filed February 14, 1945 (R. 28-30), and Notice of Appeal was filed May 14, 1945 (R. 30). The jurisdiction of this Court is sustained by Judicial Code, §128(a) First (28 U.S.C.A. §225(a) First).

The pleadings are not set out here in detail because they are set out under the Statement of the Case.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court of the United States in and for the Northern Division of California, Southern Division, rendered on February 14, 1945.

Said judgment appears on pages 28 to 30 of the Transcript.

A reading of said judgment will disclose that it was made and entered upon a motion of the defendant and appellant for a summary judgment in its favor and upon a motion to dismiss the plaintiff's complaint with prejudice. Said motions appear at pages 10 to 17 of the Transcript.

It should be noted that these motions were made and heard prior to any answer or demurrer of the defendant and, of course, prior to the trial of any of the issues embraced in the Complaint. In other words, the judgment if allowed to stand, precludes the plaintiff from ever receiving any relief upon the facts set forth in his Complaint.

The Court filed a memorandum decision with respect to said motions. This appears on pages 26 and 27 of the Transcript. In that decision, the Court used the following language:

"Accordingly the motion to dismiss is granted with leave to plaintiff to appropriately amend his complaint (Rule 15 F.R.C.P.) (29).

"Decision on the motion for summary judgment is reserved and the court will determine the same after the amended complaint and such affidavits as defendant may desire to file are before the court."

It thus appears the Court granted the motion to dismiss but gave plaintiff leave to appropriately amend his complaint; the Court reserved its decision on the motion for summary judgment until the amended complaint and such affidavits as defendant might file were before the Court. The plaintiff declined to amend his complaint and thereupon the Court rendered its judgment (Tr. 28 to 30), and therein stated as follows:

"It further appearing that the defendant is entitled to have its motion for a summary judgment granted upon the ground that it is entitled to a judgment dismissing plaintiff's complaint, as a matter of law, for the reason that plaintiff's cause of action is barred because of the lapse of time as stipulated in the contract of insurance referred to in plaintiff's complaint;

"It is accordingly adjudged that the complaint in this action be and it is hereby dismissed with prejudice upon the ground that there is no genuine issue as to any material fact, and upon the further ground that the alleged cause of action set forth in plaintiff's complaint has become barred, and that the claim has lapsed by reason of the failure on the part of plaintiff to commence any action against the above named defendant in respect of his alleged claim arising under the certificate of membership, and the constitution

and by-laws of the defendant within six months after the refusal of the defendant to pay plaintiff's claim."

The points at issue on this appeal are few and clear.

THE COMPLAINT

The Complaint in this action (Tr. 226) is one brought by the plaintiff and appellant as the *beneficiary named in the certificate of membership* issued by the defendant and respondent to one George Gifford (who was his father). The allegations of the Complaint set forth:

1. That the defendant was a *fraternal benefit society.*

2. That one George Gifford was a Class "A" member of the defendant for a period of fifteen (15) years, and *that he had fully complied during that period of time with all of the terms and conditions of such membership and had fully paid all the dues and assessments imposed upon him.*

3. That on the 9th day of May, 1932, there was issued and delivered by the defendant to George Gifford a certificate of membership, wherein and whereby said George Gifford was entitled to the benefits accruing to a Class "A" member of defendant, and whereby said defendant agreed to and did insure said George Gifford against any accident occurring to him from which a claim for benefits arose and that under said certificate of membership and insurance, defendant agreed to insure and pay the benefits accruing to said George Gifford in the case of his death, to the plaintiff, the son of said George Gifford.

4. That under and by virtue of said certificate, defendant agreed to pay to the plaintiff as the beneficiary named in said certificate, the sum of $5,000.00 if said member

George Gifford were killed by accidental means, which, independently of all other causes through external, violent and accidental means, caused bodily injury which solely and exclusively caused the death of said George Gifford.

5. That said George Gifford was at all times mentioned in the Complaint and up to the time of his death—September 3, 1943—*a Class "A" member in good standing and had fully complied with all the rules, regulations, by-laws, constitution and other requirements of defendant.*

6. That on the 3rd day of September, 1943, said George Gifford was killed by accidental means, which, independently of all other causes, through external, violent and accidental means, caused bodily injuries to him, which bodily injuries were the sole and exclusive cause of his death on September 3, 1943.

7. The accidental manner in which said accidental death occurred is set forth fully and in detail in paragraph VII of the Complaint (Tr. 4 and 5).

8. *That plaintiff has fully complied with all the terms and conditions of said certificate of membership and duly, and in the time provided for in said certificate, notified the defendant of the death of said George Gifford, and demanded payment of the $5,000.00 insurance provided for in said certificate.*

9. That the defendant refused to pay the said amount, or any portion thereof, and all thereof remains due, owing and unpaid.

Upon such motions of defendant, all intendments and inferences in favor of plaintiff that could possibly be drawn from the allegations of the Complaint must be made by

this Court and the facts and allegations and legal conclusions therefrom set forth in the Complaint must be deemed true and correct.

Without filing an answer or demurring, the defendant moved the lower court for a summary judgment in favor of the defendant dismissing plaintiff's complaint with prejudice (Tr. 11). The *only* ground of said motion was that the cause of action had become barred and that the claim had lapsed by reason of plaintiff's failure to bring action within six (6) months after the *purported* refusal of the defendant to pay.

The motion was supported by an affidavit of one T. J. Hagaman, the Assistant Secretary of defendant, wherein it is admitted that defendant had duly issued its Class "A" membership on May 9, 1932, set forth as Exhibit "A" (Tr. 21 to 24). Said affiant further incorporated in his affidavit as Exhibit "B" a copy of the articles of incorporation, constitution and by-laws of the defendant, in force and effect on September 3, 1943. Six printed copies of said Exhibit "B" (yellow) were by stipulation of counsel filed with the Clerk of this Court, and the printed Exhibit "B" was transferred in its original form to the Clerk of this Court (Tr. 44 and 45).

The affidavit further sets forth that prior to December 21, 1943, the plaintiff made a *claim against the defendant* (i.e., affiant's conclusion as to it being a claim) as the beneficiary under said certificate of membership, Exhibit "A", and that thereafter the defendant refused to pay the *claim* (sic), and notified the plaintiff in writing of its *refusal* (sic) and set forth its letter, *which purported to be such refusal, as Exhibit "C"* (Tr. 25).

The portion of the constitution and by-laws on which defendant based its motion, is set forth in said affidavit as Section 7 of Article 12, and is found on page 44 of the yellow printed articles of defendant filed with this Court, and on page 20 of the Transcript.

It should be noted that the Complaint in this action was filed in the Superior Court of the State of California in and for the City and County of San Francisco on September 1, 1944 (Tr. 6).

Assuming that the so-called *letter of refusal to pay,* Exhibit "C" (Tr. 25), which was dated December 21, 1943, and sent from St. Louis, Missouri, to the plaintiff in San Francisco, was received on December 27, 1943 (as is alleged by the affiant in his affidavit on page 20), and inasmuch as the complaint was filed on the *1st day of September, 1944* in the Superior Court of the State of California, *there was a lapse of time of exactly eight months and three days,* and it is upon this single point of delay of two months and three days exceeding the six months period referred to in Section 7 of the Articles, that the defendant based its motions for summary judgment and for dismissal of the complaint with prejudice.

SPECIFICATION OF ERRORS

The Court erred in holding that the complaint failed to state a claim upon which relief could be granted.

The Court erred in dismissing the complaint and/or rendering summary judgment upon the basis of matter not appearing on the face of the complaint.

The Court erred in holding that plaintiff's claim was barred by the lapse of time.

The Court erred in holding that the complaint failed to state a claim upon which relief could be granted in that it failed to anticipate a possible personal defense.

The Court erred in entertaining a motion for summary judgment.

The Court erred in holding that there was no genuine issue as to any material fact.

Reference is respectfully made to appellant's Statement of Points on which appellant intends to rely (R. 31, 32).

ARGUMENT

I.

THE PLAINTIFF BEING A BENEFICIARY AND NOT A MEMBER OF DEFENDANT FRATERNAL SOCIETY, WAS NOT BOUND BY SECTION 7 OF THE ARTICLES OF INCORPORATION, CONSTITUTION AND BY-LAWS, TO BRING THIS ACTION WITHIN SIX MONTHS FROM THE REFUSAL OF DEFENDANT TO PAY IF SUCH A REFUSAL WAS ACTUALLY MADE. (See Point II herein.)

At the outset it should be noted that the defendant is a fraternal benefit society (see paragraph I of Complaint, Tr. p. 2) and *that for over a period of fifteen (15) years George Gifford was a member of the defendant association and fully paid his dues and complied with all the terms of his membership* (par. II, Complaint, Tr. p. 2).

In considering claims against such fraternal organization, it has been held that the by-laws of such mutual benefit society must be construed liberally with a view to effectuate the benevolent purposes of their organization; that such by-laws must be reasonable, and all which are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the members are void.

See

Niblack on Benefit Societies and Accident Insurance, p. 32, Section 17.

Forfeitures are not favored by either courts of law or equity, and statutes and contracts are construed strictly against forfeitures and as liberally as possible to prevent them.

See

12 *Cal. Jur.,* Section 3, p. 634.

These principles are adopted and established by the courts. See

Ells v. Order U. S. Travelers of Am., 20 Cal.(2d) 290, Syllabus 5, p. 291.

In that case, on page 293, the Court said:

"The basis of these decisions is that since the insured is a party to the contract of insurance, he is charged with knowledge of all its terms, including the constitution of the order, as the latter was made a part of the contract. *However, we wish to add at this time that these cases are of doubtful authority in determining whether the beneficiaries named in the insurance certificate but not the parties to the contract are charged with knowledge of its terms.*"

On page 294 the Court said:

"It might be well to call attention to the fact that appellant, as appears from its name, is a 'fraternal beneficial order' and that one of its objects, as appears from its constitution, is 'To give all moral and material aid in its power to its members and those dependent upon them, also to assist the widows and orphans of deceased members.' *The rules and regulations of such an order are not given the strict and rigid construction applied to the interpretation of ordinary contracts of insurance.* In the case of Journeymen Butchers' Association v. Bristol, 17 Cal. App. 576 (120 Pac. 787), the principle was announced at page 578 in the following language: '*As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order.* (Citing cases.)"

That these fraternal society memberships and certificates are to be construed liberally to effect their benevolent purposes, see

Journeymen Butchers' Prot. and Benevolent Assn. of the Pacific Coast, 17 Cal. App. 576, second syllabus.

In this case the Court said on page 578:

"As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order."

That periods of limitations provided for in the articles, constitution and by-laws of fraternal societies and their insurance policies have not the force of statutory law when they are in derogation of and cut down the statutory limitation within which an action may be brought, see

Bollinger v. National Fire Ins. Co., 25 Cal.(2d) 399.

In that case the Supreme Court of the State of California held *that the short period of limitation of fifteen (15) months fixed in the contract of insurance within which suit might be brought, must be disregarded by the courts when necessary to serve the ends of justice, and that such a provision is not binding on the insured.*

On page 410, the Court said:

"In any event this court is not powerless to formulate rules of procedure where justice demands it. Indeed, it has shown itself ready to adapt rules of procedure to serve the ends of justice *where technical forfeitures would unjustifiably prevent a trial on the merits.* (Citing cases.)"

And the Court made very pertinent remarks about the good faith of insurance companies and its duty to its insured, when it used the following language on page 411:

> "It is likewise unnecessary to dwell upon the contention that the insurer's duty of good faith to its insured arises at the time of contracting and persists *throughout the period when premiums are paid and no return is sought,* but that when a loss occurs and the insured seeks to obtain the compensation provided in the contract, the parties deal at arm's length. It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or *whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.*"

An illuminating case in which the *defendant here was the defendant there, and which refused to enforce the limitation of six months provided by this very Section 7 of the by-laws,* is the case of

> *Kendall v. Travelers' Prot. Ass'n of America,* 169 Pac. Rep. 751.

In that case, *this very same defendant sought to evade its responsibility by claiming that the action had not been brought within six months after the refusal of the Company to pay, and set forth the identical Section 7 described in the affidavit in this case.*

The Court on page 756 discusses the conventional limitations in policies of insurance of this kind in a fraternal organization, and holds that any ambiguity or conflict in the articles or by-laws must be construed in favor of the

insured and against the company, and though *the action was brought after the six months limitation provided in Section 7 of the articles of the constitution and the by-laws, the Court held that the action was brought in time.* On page 757 the Court said:

> * * * "that construction will not be placed upon the contract which will enable one party in its discretion to destroy or abridge a plain right of the other under the same contract. We are of the opinion, therefore, that under the admitted facts the action was commenced in time."

Similarly the courts of California have refused to enforce a by-law of a fraternal organization which required action to be brought *within eighteen months* after the death of the insured.

See

Bennett v. Modern Woodmen of America, 52 Cal. App. 581.

The court in that case said that it would follow the rule announced in *Case v. Sun Ins. Co.,* 83 Cal. 473, 476, holding that the plaintiff's action is removed from the application of the general rule of limitations, and the Court on page 587 said as follows:

> "To hold otherwise would enable the insurer to collect assessments indefinitely, in disregard of the forfeiture, so long as it suited its interest to do so," * * *

and said:

> "The association ought not to be permitted to take advantage of its own neglect and refuse payment on the ground that the beneficiary did not sooner compel payment."

A very recent case illustrating the refusal of courts to enforce short periods of limitations contained in policies of insurance, is the case of

Bollinger v. National Fire Ins. Co.

This case was decided December 6, 1944, in 25 Cal.(2d) page 399, and in that case on page 407, the Court said:

> "Under the circumstances of the present case *it would be manifestly unjust for this court to prevent a trial on the merits which the law favors* (citing cases)."

On page 411 the Court says:

> "Statutes of limitations are not so rigid as they are sometimes regarded."

And the Court concluded its opinion on page 411 with the following trenchant language:

> "It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, *or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.*"

It has very recently been held by the Supreme Court of California that the rules and regulations of a fraternal benefit society are not given the strict and rigid construction applied to ordinary contracts of insurance.

See

Ells v. Order of United Commercial Travelers of America, 20 Cal.(2d) 290, syllabus 2, 3, 4 and 5.

The Court in that case on page 294 used the following language:

"It might be well to call attention to the fact that appellant, as appears from its name, is a 'fraternal beneficial order' and that one of its objects, as appears from its constitution, is 'To give all moral and material aid in its power to its members and those dependent upon them, also to assist the widows and orphans of deceased members.' (2) The rules and regulations of such an order are not given the strict and rigid construction applied to the interpretation of ordinary contracts of insurance. In the case of Journeymen Butchers' Association v. Bristol, 17 Cal. App. 576 (120 Pac. 787), the principle was announced at page 578 in the following language: 'As before stated, the object of a society of this kind is to assist and benefit the families and heirs of deceased members; and courts are bound to construe its rules and regulations liberally to effect the benevolent purposes of the order.' (3 Am. & Eng. Ency. of Law, 1067; Niblack, §§160-175; Keener v. Grand Lodge, 38 Mo. App. (543) 553.)"

"Niblack on Benefit Societies and Accident Insurance states in section 17, page 32: 'The by-laws of mutual benefit societies should be construed liberally, and with a view to effectuate the benevolent purposes of their organization.' The same author further states in section 23, page 44: '* * * their by-laws must be reasonable, and all which are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void.''

And the Court further—on page 301—said as follows:

"These facts were that the beneficiary (plaintiff) had no knowledge of the existence of the insurance, and therefore knew nothing of the forfeiture clause

in the policy. It was further held by said court that the beneficiary was excused from giving notice. The only possible reason the court should so hold, it seems to us, would be predicated upon the fact that the beneficiary had no knowledge of the insurance until after the body was cremated. * * *

"It is well settled in this state as well as in other jurisdictions that forfeitures are not favored by either courts of law or equity. 12 Cal. Jur., section 3, page 634, states: 'statutes and contracts are construed strictly against forfeitures or as liberally as possible to prevent them.' This rule against forfeitures is so well established that further citation of authority is, we think, unnecessary."

We therefore submit that the plaintiff *(a mere beneficiary)*, not being a member of the defendant fraternity society, is not bound by the very short period of limitation provided for in its articles and by-laws. *A fortiori* is this so, when *a member himself* is not bound by such short period of limitation as was decided in the foregoing cases.

II.

THE LETTER OF DEFENDANT, DATED DECEMBER 21, 1943, TO THE PLAINTIFF, EXHIBIT "C" (Tr. 25) WAS NOT A REFUSAL OF THE DEFENDANT TO PAY THE CLAIM WITHIN THE PURVIEW OF SECTION 7 OF DEFENDANT'S BY-LAWS (Tr. p. 20).

The letter is set forth in full on page 25 of the Transcript and was attached as Exhibit "C" to defendant's moving papers. A close examination of that letter does not convey to the recipient a flat refusal in any event to

make payment of any claim. The letter is an evasive one calculated to do the very thing it succeeded in doing, to wit: to lull the recipient into a belief that further negotiations or correspondence should be undertaken.

Firstly, in the opening paragraph of the letter it purports to be a notification that the defendant had made an *investigation of the facts in accordance with the request made by the* MOTHER *of the beneficiary.* No reference is made to any claim for payment made by the plaintiff, the beneficiary and appellant herein.

The second paragraph is a recital of what the defendant believes to be the legal effect of the language used in its certificate of insurance. It then goes on to state as follows:

> "The conclusion reached by the pathologist who performed the autopsy is that your father's death was caused by 'Coronary sclerosis with occlusion and myocardial failure'."

The final paragraph of the letter following the foregoing quotation is as follows:

> "Under the circumstances we regret to advise you that there is no liability on the part of the Association and it regrets that it cannot be of service to you."

There was no occasion for the making of this statement. No services were requested by the plaintiff and no opinion was requested by him of the defendant as to what the legal effect of the language of the certificate of insurance might be. All that the *mother* of plaintiff had done was to notify the defendant of the accident and the death of his father. No formal presentation of any claim

under the certificate of insurance up to that time had been made and *no demand for payment of the claim had been made by the beneficiary, the appellant herein.* So the defendant could obviously not treat its letter as a refusal to pay a claim which had not yet been made or presented by the beneficiary, the plaintiff herein.

All that was required of the beneficiary was to notify the defendant of the accident and the death of its member George Gifford (as was done by his *mother*) and it was then incumbent upon the defendant to investigate the facts. The plaintiff in his complaint alleges in paragraph VII, page 5:

> "Plaintiff has fully complied with all of the terms and conditions of said certificate of membership described in Paragraph III hereof, and duly and in the time provided for in said certificate notified the defendant of the death of said George Gifford as above described, and demanded payment of the $5,000.00 insurance provided for in said certificate of membership heretofore described."

The defendant cannot by its ingenuous letter of December 21, 1943, torture its language into a flat refusal of payment of a claim that had not yet been made. *All that it succeeded in doing by that letter was to lull the plaintiff into a situation whereby the plaintiff waited for a period of eight months and three days before filing his action to enforce the payment of this claim.*

It may well be that plaintiff made further investigation of the cause of the member's death and sought advice concerning the liability of defendant and such a short delay of 2 months and 3 days can not have misled or caused defendant any detriment or danger; and defendant has made no showing to that effect.

The action of the defendant in lulling the plaintiff into his present situation, estops defendant from now asserting that said letter constituted a final refusal of payment (which it did not) and prevented it from now seeking to take an unconscionable advantage of the *plaintiff, a mere beneficiary, not familiar with the rules, by-laws and constitution of the defendant fraternal association.*

The courts have declared that they will not lend themselves to countenance such inequitable procedure. See

Bollinger v. National Fire Ins. Co., 25 Cal.(2d) 399 (supra);

Kendall v. Travelers' Prot. Ass'n of America, 169 Pac. Rep. 751 at p. 757 (supra).

The action and conduct of the defendant and the writing of the letter, Exhibit "C" (Tr. 25), and the effect thereof on the plaintiff, creates an equitable estoppel against the defendant now asserting the plea in bar, based upon the limitation period provided for in Section 7 of its constitution; and this is true even though there was no designed fraud on the part of the defendant company. See

Benner v. Industrial Acc. Comm., 26 A.C. No. 12, page 265.

In that case the petitioner wrote a letter to the employer on May 11, 1943, notifying it that the petitioner had a claim against it for tuberculosis industrially caused and compensable. The action was not brought until more than six months after May 11, 1943. The Commission found that day as the one on which she had knowledge of the injury and held that her claim was barred, because it was not filed within six months thereafter, to wit: on November 16, 1943.

There as in this case, the defendant company had written a letter advising the petitioner that it was investigating the facts; but notwithstanding the finding and conclusion of the Commission that the petitioner was barred by the six months limitation, the Appellate Court held that the action could be maintained because of the equitable estoppel arising against the defendant. The second and third syllabuses of that case are as follows (p. 265):

> "(2) Estoppel—Elements—Fraud.—An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped.
>
> "(3) Id.—Elements.—To create an equitable estoppel, it is enough that the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss."

On the doctrine of equitable estoppel and its effect in estopping the defendant from pleading the six months' provision as a bar, see also:

Farrell v. County of Placer, 23 Cal.(2d) 624;

Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655 at page 682.

In the latter case, the Court said:

> "It is enough if the party has been induced to refrain from using such means or taking such action as lay in his power by which he might have retrieved his position and saved himself from loss."

In

Adams v. Cal. Mut. B. & L. Ass'n, 18 Cal.(2d) 487,

the Court at page 488 said:

"It is well settled that a person by his conduct may be estopped to rely upon these defenses;"

and in

Rapp v. Rapp, 218 Cal. 505,

the Court held that where the delay in commencing action is induced by the conduct of the defendant, it cannot be availed of by him as a defense. To the same effect, see

Miles v. Bank of America, N. T. & S. Ass'n, 17 Cal. App.(2d) 389, at page 397;

37 *Corpus Juris,* pp. 725-726.

In the concluding paragraph of its decision in the case of *Benner v. Industrial Acc.,* supra, the Court, on page 269, held as follows:

"Such conduct, so relied upon, becomes the basis of an estoppel against the party responsible for the delay and should, under the facts here presented, preclude the bar of the statute of limitations."

And in that case, it should be noted that the Commission below had directly found that the action was barred; nevertheless, the Supreme Court reversed the decision with instructions to proceed in accordance with its views.

So also has it been held that the doctrine of equitable estoppel applies even against the Government and its agencies. See

Farrell v. County of Placer, 23 Cal.(2d) 624.

In that case, which was an action against a county for personal injuries, the Court held that the defendants were estopped to complain that plaintiff's complaint was filed after the expiration of the ninety (90) day period pre-

scribed by Statute of 1931, because before the expiration of that time, the plaintiff had filed a complete statement concerning the accident and she was advised to wait until she knew the extent of her injuries. See

Third syllabus on page 624.

And the Court quoted with approval from the case of *Times-Mirror Company v. Superior Court,* on page 628,

as follows:

> "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. 'It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication.' (Humboldt Sav. Bank v. McCleverty, 161 Cal. 285 (119 P. 82), citing Story's Equity Jurisprudence, secs. 28, 439; 1 Pomeroy's Equity Jurisprudence, sec. 60.) * * * * 'Although equity is and long has been in every sense of the word a system, and although it is impossible that any new principles should be added to it, yet the truth stands and always must stand that the final object of equity is to do right and justice.' "

That such conduct estops the defendant is especially true when we consider that the defendant here is seeking to abridge and shorten the ordinary statute of limitation by asserting a plea in bar based upon a much shorter period of time, to wit: six months; and it must be remembered *that the plaintiff was not and is not a member of*

defendant's association, but a mere beneficiary, and as the courts have held, is not deemed to have notice of the short period of limitations provided for in the defendant's articles and by-laws. Thus, in the case of

Bennett v. Modern Woodmen of America, 52 Cal. App. 581, at page 587,

the Court refused to enforce a by-law of the organization which required action to be brought within eighteen (18) months after the death of the insured, and further said it would follow the rule announced in

Case v. Sun Ins. Co., 83 Cal. 473, 476,

holding that the plaintiff's action is removed from the application of the general rule of limitations, and on page 587 the Court used the following language, which is peculiarly appropriate to the case at bar:

> "The association ought not to be permitted to take advantage of its own neglect and refuse payment on the ground that the beneficiary did not sooner compel payment."

In the case of

Bollinger v. National Fire Ins. Co., 25 Cal.(2d) 399,

the Court at page 407 said:

> "Under the circumstances of the present case *it would be manifestly unjust for this court to prevent a trial on the merits which the law favors* (citing cases)."

and on page 411 the Court said:

> "Statutes of limitations are not so rigid as they are sometimes regarded."

A fortiori, the by-laws of a fraternal association of which the *plaintiff is not a member cannot be held so rigid as to constitute a bar to plaintiff's claim, and prevent him from having his day in court.*

III.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PREMATURE, AND THEREFORE A JUDGMENT BASED ON SUCH MOTION WAS IN ERROR.

It should be noted that the plaintiff's complaint was the only pleading on file. Defendant had not demurred or answered. In such a situation, the motion of defendant for summary judgment was premature and unwarranted.

See

Rules of Civil Procedure 12, Subdivision (c);

Snowhite v. Tidewater Associated Oil Company, 40 Fed. Supp. 739, 741.

The motion to dismiss the complaint with prejudice filed by the defendant in connection with his motion for summary judgment is in the nature of the old demurrer and on such a motion every allegation of the complaint must be treated as admitted, and *the duty of the court is not to test the final merit of the claim, but rather to consider in the light most favorable to the plaintiff and with every intendment regarded in his favor, whether the complaint is sufficient to constitute a valid claim.*

See

Tahir Erk v. Glenn L. Martin Co., 116 Fed.(2d) 865, Syllabus 1 and 2, and page 867;

Leimer v. State Mut. Life Assur. Co., 108 Fed.(2d) 302, at page 305.

At page 306 of the latter case, the Court said:

> "we think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." (Citing cases.)

The same Court that granted the summary judgment in this case had very shortly theretofore decided that Rule 12 of the Civil Procedure authorized the Court in the case of motion to dismiss to defer the hearing and determination thereof until the time of trial; see

> *Bowles v. Bissinger & Co.,* decided May 2, 1940 by Judge Goodman,

and the Court then used this language:

> "In the interests of justice, decision with respect to the sufficiency and materiality of the second special defense pleaded by the defendant should not be made in this case solely upon the basis of the language of the pleading."

And the Court thereupon denied the motion to strike said second special defense.

In the case of

> *Perry v. Creech Coal Co.,* 55 F. Supp. 998,

the Court stated the rule as follows:

> "Pleadings should be liberally construed in favor of the pleader and a motion to dismiss for failure to state a claim should not be granted unless it clearly appears that plaintiff would be entitled to no relief

under any state of facts which could be proved in support of the claim."

The complaint alleges that the plaintiff has fully complied with all the terms and conditions of the certificate of membership, and duly and in the time provided for in said certificate notified the defendant of the death of the insured, and demanded payment of the insurance provided for in said certificate (see paragraph VIII of the Complaint (Tr. 5)).

The by-laws concerning limitations, asserted by the motion to dismiss and the motion for summary judgment do not *ipso facto* operate as a bar, but rather as a defense to be pleaded by the party relying upon it, and unless such plea is made it would not be a bar to the action; see

Kissick Const. Co. v. First Nat. Bank of Wahoo, 46 Fed. Supp. 869,

where the Court used the following language on page 871:

"Although the petition may have shown on its face that the causes of action stated in the first and third counts were barred by the statute of limitations, yet, unless the defendant had seen fit to interpose the bar by appropriate plea, the plaintiff would have proceeded to judgment thereon. *The plea of the statute is personal to the defendant. It might, as debtors often do, have waived the privilege.* * * *

"Here, the available bar of the statute of limitations, *not appearing on the face of the petition,* is by the defendant made to appear by a credible, persuasive and undisputed showing by the defendant in support of its motion."

The Court thereupon overruled a motion for summary judgment. On page 872 the Court said:

> "An examination of Rule 56 and its several sections, and of the decisions delivered in the course of its application leads to the *conclusion that a summary judgment should not be granted unless the facts are clear and undisputed;* and that if a controversy remains upon any question of fact, judgment should abide a trial of the action upon its merits." (Citing cases.)

In the case at bar there is nothing in the complaint which shows the action to be barred by any provision of the certificate, by-laws or statute.

The discretion of the Court on a *motion to dismiss should be exercised only if the defect clearly appears on the face of the pleading,* otherwise the defense should be raised on motion for judgment on the pleadings *after joinder of issue;* see

Teren v. San-Nap-Pak Mfg. Co., Inc., 49 Fed. Supp. 1023, U.S. Dist. Ct., S.D.N.Y., Feb. 11, 1943;

Continental Collieries, Inc. v. Shober, 130 F.(2d) 631.

To the same effect see:

Brauch v. Birmingham, 49 Fed. Supp. 229;

Tyler Fixture Corp. v. Dun & Bradstreet, 3 F.R.D. 258;

Kohler v. Jacobs, 138 F.(2d) 440;

Dioguardi v. Durning, 139 F.(2d) 774.

The federal rules do not sanction the disposition of doubtful issues of fact or law on motions to dismiss for insufficiency of the pleading:

Publicity Building Realty Corp. v. Hannegan, 139 F.(2d) 583;

United States v. Thurston County, 54 F. Supp. 201;

Bowles v. Shirey, 7 Fed. Rules Serv. 152.

We respectfully submit that under the decisions and rules of procedure the motion for summary judgment and for a dismissal of the complaint with prejudice was premature, unfounded, and wrongful as to the appellant, a beneficiary named in the certificate of insurance who was not a member of defendant's association.

Under the authorities above cited, the judgment based upon such motions should be reversed.

Respectfully submitted,

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